

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RICHARD J. KLEIN,

Plaintiff,

v.

GREGORY DEMOPULOS, an individual,  
and OMEROS CORPORATION, a  
Washington Corporation,

Defendants.

Case No. C09-1342-JCC

ORDER

The Court is presented with a swarm of ten motions filed over a seventeen-day period, addressing matters ranging from discovery to summary judgment. (Dkt. Nos. 95, 101, 103, 110, 117, 133, 136, 137, 141 & 143.) Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby rules as follows.

**I. BACKGROUND**

The facts of this case have been discussed at length in the Court's prior orders (Dkt. Nos. 14 & 43), and need not be repeated here.

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## II. DISCUSSION

### A. Motion to Compel Production of Documents Withheld due to Privilege

The Ninth Circuit has recognized two distinct forms of waiver of attorney-client privilege. *Bittaker v. Woodford*, 331 F.3d 715, 718–720 (9th Cir. 2003). Implicit waiver occurs when a party places the nature of the attorney-client communications at issue. *Id.* at 718 (holding that a litigant waives the attorney-client privilege by putting the lawyer’s performance at issue in a claim involving ineffective assistance of counsel); *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002) (holding that a litigant waives the privilege by filing a lawsuit for indemnification seeking recovery for legal expenses thereby putting the work of its attorneys at issue). Explicit waiver occurs “when a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public.” *Bittaker*, 331 F.3d at 719. In these circumstances, once documents have been turned over to another party voluntarily, the privilege is gone, and the litigant may not thereafter reassert it to block discovery of the information and related communications by his adversaries. *Id.* at 720. In this instance, Plaintiff waived neither form of privilege.

#### 1. Implicit Waiver

Defendants’ first argument involves implicit waiver: by bringing an indemnification claim for his attorney fees and by asserting an advice-of-counsel defense, Plaintiff placed his attorney communications directly at issue, and waived his privilege. (Mot. 8 (Dkt. No. 103).) In response, Plaintiff now withdraws his indemnification claim, and states that he will not assert an advice-of-counsel defense. (Resp. 5 (Dkt. No. 128).) The Ninth Circuit has held that such a withdrawal is a legitimate method of preserving privilege: “The holder of the privilege may preserve the confidentiality of the privileged communications by choosing to abandon the claim that gives rise to the waiver condition.” *Bittaker*, 331 F.3d at 721. Defendants’ attempts to distinguish this precedent fail. Defendants argue that once a party waives privilege, it cannot

1 be reasserted. (Reply 2 (Dkt. No. 145).) As discussed above, however, this is only true for  
2 explicit waiver of privilege; implicit waivers can be abandoned and the corresponding privilege  
3 reasserted.

## 4 **2. Explicit Waiver**

5 Defendants' second argument is that by testifying about the substance of conversations  
6 with his attorneys, Plaintiff explicitly waived privilege as to the substance of those  
7 conversations. (Mot. 9 (Dkt. No. 103).) Plaintiff counters that he agreed to a limited waiver  
8 only to the extent necessary to prove the reasonableness of the fees for which he sought  
9 indemnification, and that he only disclosed materials relating to corporate governance  
10 associated with the whistleblower complaint and his duties as CFO. (Klein Decl. ¶ 10 (Dkt.  
11 No. 130).) Plaintiff states that the scope of his waiver should be construed narrowly.

12 When a privilege is waived, its scope extends to all communications on the same  
13 subject matter. When considering the subject matter of a waiver, courts weigh the  
14 circumstances of the disclosure, the nature of the legal advice sought, and the prejudice to the  
15 parties of permitting or prohibiting further disclosures. *Phoenix Solutions Inc. v. Wells Fargo*  
16 *Bank, N.A.*, 254 F.R.D. 568, 576 (N.D. Cal. 2008). For guidance on the scope of waiver, the  
17 Court turns to *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18 (9th Cir.  
18 1981). In that case, a mutual fund had disclosed a) advice from its counsel about where to  
19 register and b) a letter from in-house counsel to outside counsel suggesting that the fund  
20 register in certain states. The fund then asserted attorney-client privilege and refused to  
21 respond to requests relating to advice given to the fund by outside counsel regarding  
22 registration pursuant to state Blue Sky laws. *Id.* at 23. The Ninth Circuit found that the fund  
23 had waived the attorney-client privilege "only as to communications about the matter actually  
24 disclosed namely, the substance of Blue Sky counsel's advice regarding registration of Fund  
25 shares pursuant to the Blue Sky laws of the various states." *Id.* at 25. It was only over the  
26 *precise* subject matter of the disclosure that the court found privilege had been waived.

1 Where the Ninth Circuit's scope for waiver was narrow, Defendants' is broad.  
2 Defendants' position is that even limited disclosures about certain aspects of Plaintiff's  
3 employment amount to a waiver of privilege for all communications relating to his  
4 employment. (Mot. 11 (Dkt. No. 103).) The Court does not agree. Plaintiff chose to release a  
5 limited and discrete set of information, and there is no reason to construe these disclosures as a  
6 blanket waiver of privilege. Other than the limited substance of his disclosures, Plaintiff's  
7 communications with his attorneys concerning general employment matters are privileged.  
8 Defendants' motion is DENIED.

9 **B. Motion to Compel Responses to Interrogatories**

10 Defendants claim that Plaintiff's responses to Interrogatories 15 and 16 are inadequate  
11 and should provide more specific and wider-ranging detail. (Dkt. No. 110.) Upon review of  
12 Plaintiff's responses, the Court finds that Defendants protestations are without merit. The rules  
13 of civil procedure are not to be construed in a way that would "require plaintiff to provide the  
14 equivalent of a narrative or otherwise detailed account of her entire case in chief, together with  
15 identification of virtually all supporting evidence for each fact." *Hilt v. SFC Inc.*, 170 F.R.D.  
16 182, 186 (D. Kan. 1997). Defendants' motion is DENIED. (Dkt. No. 110.)

17 **C. Motion to Extend Time for Disclosure of Expert Report**

18 Plaintiff requests that the Court extend the deadline to disclose expert reports by two  
19 weeks. (Dkt. No. 141.) By the time Plaintiff filed his reply brief eight days later, the report had  
20 been disclosed. (Reply 1 (Dkt. No. 158).) Defendants argue that the delay is unjustified and  
21 harmful. (Resp. 5 (Dkt. No. 151).) With respect to justification, Plaintiff's explanations of his  
22 expert's unavailability are satisfactory. With respect to harm, in cases cited by Defendants to  
23 establish harm, the delay was far longer than in this case. *See Northwest Pipeline Corp. v.*  
24 *Ross*, 2008 U.S. Dist. LEXIS 32984, \*29–30 (W.D. Wash. Apr. 11, 2008) (noting a delay of  
25 eight months in disclosing an expert report). The Court finds that an extension of the deadline  
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1 is warranted, and GRANTS the Plaintiff's motion pursuant to FRCP 26(a)(2)(C). (Dkt. No.  
2 141.)

### 3 **D. Motion for Continuance and to Strike**

4 Plaintiff also moved for a continuance pursuant to FRCP 56(f) and to strike  
5 Defendants' summary judgment motions pursuant to LR 7(e)(3). (Dkt. No. 143.) Plaintiff now  
6 withdraws his motion for continuance (Dkt. No. 155), but his motion to strike survives. Local  
7 Rule 7(e)(3) states: "Motions for summary judgment . . . shall not exceed twenty-four  
8 pages. . . . The filing of multiple dispositive motions to avoid the page limits of this rule is  
9 strongly discouraged and successive motions may be stricken." On October 12, 2010,  
10 Defendants filed three successive motions for summary judgment, totaling fifty-seven  
11 substantive pages. (Dkt. Nos. 133, 136 & 137.) These filings are excessive and unjustified.  
12 Defendants are warned that the Court's patience is dwindling.

### 13 **III. CONCLUSION**

14 Defendants' motions to compel are DENIED. (Dkt. Nos. 103 & 110.) Defendants'  
15 motions to seal (Dkt. No. 95 & 101) and Plaintiff's motion to seal (Dkt. No. 117) are  
16 GRANTED. Plaintiff's motion for extension of time is GRANTED. (Dkt. No. 141.) Plaintiff's  
17 motion for continuance is STRICKEN. (Dkt. No. 143.) Defendants' motions for summary  
18 judgment are STRICKEN. (Dkt. Nos. 133, 136 & 137.) Defendants are DIRECTED to file no  
19 more than one motion for summary judgment, not to exceed twenty-four pages.  
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21 DATED this 27th day of October, 2010.  
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John C. Coughenour  
UNITED STATES DISTRICT JUDGE